



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

May 6, 1996

Mr. Jack W. Garrison
Executive Director
Texas Department of Licensing
and Regulation
P.O. Box 12157
Austin, Texas 78711

Letter Opinion No. 96-045

Re: Whether elevators in a facility that serves as the residence of members of a religious order are required to meet the requirements set forth in Health and Safety Code chapter 754, subchapter B, and related question (ID# 37383)

Dear Mr. Garrison:

You ask about chapter 754, subchapter B of the Health and Safety Code, which pertains to the inspection and certification of elevators, escalators, and related equipment.¹ The Texas Department of Licensing and Regulation (the "department"), which you represent, has received two requests regarding residential facilities for members of religious orders, which facilities are maintained by the religious orders. The requestors, the religious orders, ask that the department consider these facilities private homes, excepted from the standards adopted by the commissioner of licensing and regulation pursuant to Health and Safety Code section 754.014. You indicate that only members of the orders reside in the facilities and use the elevators in question, and that the elevators serve only areas closed to nonresidents or guests.²

As a preliminary matter, you question the continued validity of Letter Opinion No. 94-096 (1994). You note that the Seventy-fourth Legislature amended chapter 754, subchapter B of the Health and Safety Code, including provisions upon which that letter opinion relied. See Act of May 27, 1995, 74th Leg., R.S., ch. 865, § 1, 1995 Tex. Sess. Law Serv. 4313, 4314-15; Act of May 27, 1995, 74th Leg., R.S., ch. 974, § 1, 1995 Tex.

¹Section 754.011(8) of the Health and Safety Code defines "related equipment" as "automatic equipment that is used to move a person in a manner that is similar to that of an elevator or escalator and includes a moving sidewalk."

For the sake of brevity, throughout this opinion we will use the term "elevator" to include elevators, escalators, and related equipment.

²You indicate in your letter to this office that some of the facilities about which you ask are convent retirement homes. Your letter implies that these retirement facilities are not staffed by medical personnel. We therefore assume that they are not. We further assume the retirement facilities are not licensed as nursing facilities. See Health & Safety Code § 242.031.

Sess. Law Serv. 4862, 4862. At the time this office issued Letter Opinion No. 94-096, section 754.014(a) required the commissioner of licensing and regulation to

adopt standards for the installation, alteration, and operation of elevators, escalators, and related equipment used by the public in:

...

(2) buildings that contain an elevator, an escalator, or related equipment that the public is generally invited to use, including a hotel, motel, apartment house, boardinghouse, church, office building, shopping center, or other commercial establishment.

Letter Opinion No. 94-096 (1994) at 1-2 (quoting Health & Safety Code § 754.014(a), *amended by* Act of May 27, 1995, 74th Leg., R.S., ch. 865, § 1, 1995 Tex. Sess. Law Serv. 4313, 4314-15; Act of May 27, 1995, 74th Leg., R.S., ch. 974, § 1, 1995 Tex. Sess. Law Serv. 4862, 4862).

Believing that the legislature intended a court to construe section 754.014(a) liberally, we concluded that section 754.014(a) requires the commissioner of licensing and regulation to promulgate standards for the installation, alteration, and operation of all elevators designed to carry individuals in any building that is a commercial establishment. Letter Opinion No. 94-096 (1994) at 3. The opinion implicitly adopts a broad definition of the phrase "commercial establishment": an enterprise involved in any aspect of commercial and business activity and intercourse. *Id.* (quoting Letter Opinion No. 90-16 (1990) at 2-3). To describe a building that is not a commercial establishment, we adopted the phrase "private home." *See id.* Consequently, under Letter Opinion No. 94-096, the commissioner of licensing and regulation has oversight authority over any elevator designed to carry individuals in all buildings other than a private home. *Id.*

The Seventy-fourth Legislature amended section 754.014 by the passage of two bills, Senate Bill 1044 and Senate Bill 739. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 865, § 1, 1995 Tex. Sess. Law Serv. 4313, 4313-18 (S.B. 1044); Act of May 27, 1995, 74th Leg., R.S., ch. 974, § 1, 1995 Tex. Sess. Law Serv. 4862, 4862 (S.B. 739). Relevant to this opinion, the legislature amended section 754.014(a) as follows:

The commissioner shall adopt standards for the installation, alteration, [and] operation, *and inspection* of elevators, escalators, and related equipment used by the public in:

...

(2) buildings that contain an elevator, an escalator, or related equipment that *is open to the general public* [~~is generally invited to use~~], including a hotel, motel, apartment house, boardinghouse,

church, office building, shopping center, or other commercial establishment.

See Act of May 27, 1995, 74th Leg., R.S., ch. 865, § 1, 1995 Tex. Sess. Law Serv. 4313, 4314; Act of May 27, 1995, 74th Leg., R.S., ch. 974, § 1, 1995 Tex. Sess. Law Serv. 4862, 4862.

The legislature also added a new subsection (i) to section 754.014, expressly excepting from chapter 754, subchapter B an elevator "in an industrial facility, or in a grain silo, radio antenna, bridge tower, underground facility, or dam, to which access is limited principally to employees of or working in that facility or structure."³ *See* Act of May 27, 1995, 74th Leg., R.S., ch. 865, § 1, 1995 Tex. Sess. Law Serv. 4313, 4315; *cf.* Act of May 27, 1995, 74th Leg., R.S., ch. 974, § 1, 1995 Tex. Sess. Law Serv. 4862, 4862 (adding new subsection (d)). We have examined the legislative history of the amendments to section 754.014(a)(2) and the addition of subsection (i).

With respect to the amendments to section 754.014(a)(2), changing "elevator . . . that the public is generally invited to use" to "elevator . . . that is open to the general public," the legislative history indicates that the legislature believed the revision clarifies the language of the subsection. *See* Hearings on S.B. 739 Before the House Comm. on Licensing and Administrative Procedures, 74th Leg., R.S. (Apr. 19, 1995) (statement of Representative Brimer) (tape available from House Video/Audio Services Office). We find no other helpful statement of intent regarding the amendments to section 754.014(a)(2). *See* House Research Organization, Bill Analysis, S.B. 739, 74th Leg., R.S. (1995); House Comm. on Licensing and Administrative Procedures, Bill Analysis, S.B. 739, 74th Leg., R.S. (1995); Debate on S.B. 739 on the Floor of the House, 74th Leg., R.S. (May 19, 1995) (statement of Representative Brimer) (tape available from House Video/Audio Services Office).

The legislative history of subsection (i), particularly the counterpart to the subsection in Senate Bill 739, implies that it was proposed in response to Letter Opinion No. 94-096 (1994). Senate Bill 739 was intended to clarify that subchapter B does not apply to an elevator in an industrial facility, where the use of the elevator is limited principally to employees of the facility. Hearings on S.B. 739 Before the House Comm. on Licensing and Administrative Procedures, 74th Leg., R.S. (Apr. 19, 1995) (statement

³The Seventy-fourth Legislature also enacted Health and Safety Code section 754.0111. *See* Act of May 27, 1995, 74th Leg., R.S., ch. 974, § 2, 1995 Tex. Sess. Law Serv. 4862, 4862. Section 754.0111 specifically exempts from chapter 754, subchapter B "an elevator, escalator, or related equipment in a private building for a labor union, trade association, private club, or charitable organization that has two or fewer floors." You do not indicate that this exemption applies to the situation about which you ask. Accordingly, we assume that the facilities that are the subject of this request have more than two floors. We need not consider whether the religious orders constitute charitable organizations for purposes of section 754.0111.

of Representative Brimer) (tape available from House Video/Audio Services Office). A witness who testified before the House Committee on Licensing and Administrative Procedures explained that a elevator in an industrial facility is operated and inspected pursuant to the federal Occupational Safety and Health Act ("OSHA"), 29 U.S.C. ch. 15. *Id.* (statement of Frank Meyers, Association of Electric Companies in Texas); *see also* House Research Organization, Bill Analysis, S.B. 739, 74th Leg., R.S. (1995); Debate on S.B. 739 on the Floor of the House, 74th Leg., R.S. (May 19, 1995) (statement of Representative Brimer) (tape available from House Video/Audio Services Office) (responding to question from Representative Naishtat regarding applicability of OSHA). The witness further stated that the proposed bill distinguished between an industrial facility, which is subject to OSHA, and a commercial establishment, which is not subject to OSHA. Hearings on S.B. 739 Before the House Comm. on Licensing and Administrative Procedures, 74th Leg., R.S. (Apr. 19, 1995) (statement of Frank Meyers, Association of Electric Companies in Texas) (tape available from House Video/Audio Services Office).

Pertinent to the issues you raise, therefore, the amendments to Health and Safety Code section 754.014 serve primarily to exempt from the standards set by the commissioner of licensing and regulation an elevator in an industrial facility, that is, generally an elevator that is subject to OSHA. To the extent that the conclusion in Letter Opinion No. 94-096 encompasses an elevator in an industrial facility, the 1995 amendments to section 754.014 of the Health and Safety Code have superseded the letter opinion. We therefore modify the conclusion reached in Letter Opinion No. 94-096 as follows: Section 754.014 of the Health and Safety Code requires the commissioner of licensing and regulation to promulgate standards for the installation, alteration, operation, and inspection of every elevator designed to carry individuals in any commercial establishment, but not in "an industrial facility, . . . grain silo, radio antenna, bridge tower, underground facility, or dam, to which access is limited principally to employees of or working in that facility or structure." *See* Health & Safety Code § 754.014(i); Letter Opinion No. 94-096 (1994) at 3. The term "commercial establishment" in section 754.014(a)(2) thus does not encompass an industrial facility or other facility listed in section 754.014(i) or a private home. *See* Letter Opinion No. 94-096 (1994) at 4.

A residential facility that a religious order operates for its members clearly is not an industrial facility, nor is it a facility or structure otherwise within section 754.014(i) of the Health and Safety Code. Thus, an elevator in a religious order's residential facility is subject to regulation by the commissioner of licensing and regulation only if the facility is a commercial establishment, that is, an enterprise involved in any aspect of commercial and business activity and intercourse. *See id.* at 3. Significantly, section 754.014(a)(2) specifically lists as examples of a commercial establishment apartment houses and boardinghouses, both of which are residential in nature. We must distinguish, therefore, between residential facilities that are commercial establishments and those that are not.

Apartment houses and boardinghouses have some common characteristics that we believe distinguish them from a noncommercial, private home. The owner of an apartment house or a boardinghouse collects a fee on a periodic basis from each resident for the use of the apartment or room. The relationship between the owner and each resident is contractual in nature. Because the resident exchanges money for living space, we characterize the transaction as a commercial transaction, and we characterize the multi-family dwelling place in which the resident lives as a commercial establishment.

Moreover, an elevator in a commercial establishment is subject to regulation only if the public uses the elevator.⁴ Health & Safety Code § 754.014(a)(2). As we determined in Letter Opinion No. 94-096, the phrase "used by the public" encompasses "any and all individuals." Letter Opinion No. 94-096 (1994) at 3. In an apartment house and boardinghouse, for example, elevators are often located in a common area and are used by residents as well as nonresidents.

You aver that the public does not have access to the elevator in the facilities about which you ask. *But see supra* note 2. You have not informed us, however, whether the residents of the facilities pay for their living space in accordance with a contract. We are, as a consequence, unable to determine whether the residential facilities operated by a religious order are commercial establishments subject to regulation under Health and Safety Code section 754.014(a)(2). If the residents do not pay, the facilities are not commercial establishments, and any elevators in the building are not subject to regulation. On the other hand, if the residents pay for their living space, the facilities are commercial establishments, and elevators in the building are subject to regulation if the public uses the elevators.

S U M M A R Y

To the extent that the conclusion in Letter Opinion No. 94-096 encompasses elevators, escalators, and related equipment in an industrial facility, the 1995 amendments to section 754.014 of the Health and Safety Code have superseded the letter opinion. We therefore modify the conclusion reached in Letter Opinion No. 94-096 as follows: Section 754.014 of the Health and Safety Code requires the commissioner of licensing and regulation to promulgate standards for the installation, alteration, operation, and inspection of all elevators designed to carry individuals in any commercial establishment, unless the building is "an industrial facility, . . . grain

⁴The legislature's express inclusion of a church in its list of commercial establishments precludes debate about whether a church is a commercial establishment. In any event, a church is open to its members and often to the public, so an elevator in a church is likely to be used by many people.

silo, radio antenna, bridge tower, underground facility, or dam, to which access is limited principally to employees of or working in that facility or structure." The term "commercial establishment" in section 754.014(a)(2) thus does not encompass an industrial facility, nor does it encompass a private home.

An elevator in a residential facility, which facility a religious order operates for its members on a not-for-profit basis, is subject to the regulations the commissioner of licensing and regulation promulgates pursuant to section 754.014(a) of the Health and Safety Code if the facility is a commercial establishment. Generally, a residential facility is a commercial establishment if, pursuant to a contract, the residents pay a rental fee in exchange for their living space. Moreover, an elevator in a commercial establishment is subject to regulation only if the public uses the elevator.

Yours very truly,

A handwritten signature in black ink, reading "Kimberly K. Oltrogge". The signature is fluid and cursive, with the first name and last name clearly legible.

Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee